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No.

Supreme Court, U.S.

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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1983

PATRICK CONWAY, ROBERT CASTRO,
AND ROY CASTRO,
Petitioners,

-VS-

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY PETITIONERS' MOTION TO STAY PROCEEDINGS AND EVIDENTIARY HEARING, FILED PRIOR TO SELECTION OF THIS CASE'S PETIT JURY PANEL, AND FILED PURSUANT TO THE JURY SELECTION AND SERVICE ACT [28 USC §§ 1861-1868].

TABLE OF CONTENTS

| | Page |
|--|------|
| TABLE OF AUTHORITIES | iii |
| OPINIONS BELOW | iv |
| JURISDICTION | iv |
| CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED | 1 |
| STATEMENT OF THE CASE | 15 |
| ARGUMENT | 17 |
| CONCLUSION | 20 |
| APPENDIX | 1a |

TABLE OF AUTHORITIES

| | Page |
|---|--------------------------------|
| UNITED STATES CONSTITUTION | |
| Amendment 6 | 1, 15, 17 |
| UNITED STATES SUPREME COURT RULE | |
| 20.1 | 1 |
| UNITED STATES DISTRICT COURT, EASTERN DISTRICT, LOCAL COURT RULE | |
| 7(a) | 1, 18 |
| STATUTES | |
| 28 USC 1254(1) | 2 |
| 28 USC 1861-1868 | 2, 15, 16, 17, 18, 19, 2-19 |
| CASES | |
| <i>Davis v. United States</i> , 411 U.S. 233; 93 S.Ct. 1577; 36 L. Ed. 2d 216 (1973) | 17 |
| <i>Test v. United States</i> , 420 U.S. 28; 95 S.Ct. 749; 42 L. Ed. 2d 786, 789 (1975) | 19 |
| <i>United States v. Davis</i> , 592 F.2d 887, 890 (5th Cir., 1979) | 19 |
| <i>United States v. Tarnowski</i> , 429 F.Supp. 783, 791 (E.D. Mich., 1977) | 18 |

OPINIONS BELOW

The opinions of the courts below are not reported.

The opinion of the United States Court of Appeals for the Sixth Circuit below is contained in its Order filed June 20, 1983 and is contained in *Appendix A, infra*.

JURISDICTION

Petitioners seek to have reviewed the Order of the United States Court of Appeals for the Sixth Circuit which was entered on June 20, 1983.

The jurisdiction of this Court is invoked under 28 USC 1254(1) and Supreme Court Rule 20.1.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

Amendment 6, Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Supreme Court Rule 20.1

A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals shall be deemed in time when it is filed with the clerk within 60 days after the entry of such judgment. A justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days.

United States District Court, Eastern District, Local Rule 7(a)

The work of the Court is divided into five Administrative Units as follows: Detroit, Flint, Ann Arbor, Port Huron and Bay City. Clerk's offices are maintained at Detroit, Flint, Ann Arbor and Bay City. The Clerk's office for the Port Huron Administrative Unit is Detroit. The counties comprising each Administrative Unit are as follows:

1. Detroit — Civil Cases: Macomb, Oakland and Wayne;
 — Criminal Cases: Macomb, Oakland, St. Clair, Sanilac and Wayne.
2. Flint — Civil and Criminal Cases: Genessee, Lapeer, Livingston and Shiawassee.

3. Ann Arbor — Civil and Criminal Cases: Jackson, Lenawee, Monroe and Washtenaw.
4. Port Huron — Civil Cases: St. Clair, Sanilac and Macomb as provided in paragraph C(2) below.
5. Bay City — Civil and Criminal Cases: Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Gladwin, Gratiot, Huron, Iosco, Isabella, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, and Tuseola.

28 United States Code 1254(1)

Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 United States Code 1861

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

28 United States Code 1862

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

28 United States Code 1863

(a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate. The panel shall examine the plan to ascertain that it complies with the provisions of this title. If the reviewing panel finds that the plan does not comply, the panel shall state the particulars in which the plan fails to comply and direct the district court to present within a reasonable time an alternative plan remedying the defect or defects. Separate plans may be adopted for each division or combination of divisions within a judicial district. The district court may modify a plan at any time and it shall modify the plan when so directed by the reviewing panel. The district court shall promptly notify the panel, the Administrative Office of the United States Courts, and the Attorney General of the United States, of the initial adoption and future modifications of the plan by filing copies therewith. Modifications of the plan made at the instance of the district court shall become effective after approval by the panel. Each district court shall submit a report on the jury selection process within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, adopt rules and regulations governing the provisions and the operation of the plans formulated under this title.

(b) Among other things, such plan shall—

(1) either establish a jury commission, or authorize the clerk of the court, to manage the jury selection

process. If the plan establishes a jury commission, the district court shall appoint one citizen to serve with the clerk of the court as the jury commission: *Provided, however,* That the plan for the District of Columbia may establish a jury commission consisting of three citizens. The citizen jury commissioner shall not belong to the same political party as the clerk serving with him. The clerk or the jury commission, as the case may be, shall act under the supervision and control of the chief judge of the district court or such other judge of the district court as the plan may provide. Each jury commissioner shall, during his tenure in office, reside in the judicial district or division for which he is appointed. Each citizen jury commissioner shall receive compensation to be fixed by the district court plan at a rate not to exceed \$50 per day for each day necessarily employed in the performance of his duties, plus reimbursement for travel, subsistence, and other necessary expenses incurred by him in the performance of such duties. The Judicial Conference of the United States may establish standards for allowance of travel, subsistence, and other necessary expenses incurred by jury commissioners.

(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. The plan for the District of Columbia may require the names of prospective jurors to be selected from the city directory rather than from voter lists. The plans for the districts of Puerto Rico and the Canal Zone may prescribe some other source or sources of names of prospective jurors in lieu of voter lists, the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title.

(3) specify detailed procedures to be followed by the jury commission or clerk in selecting names from the sources specified in paragraph (2) of this subsection. These procedures shall be designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes. They shall ensure that names of persons residing in each of the counties, parishes, or similar political subdivisions within the judicial district or division are placed in a master jury wheel; and shall ensure that each county, parish, or similar political subdivision within the district or division is substantially proportionally represented in the master jury wheel for that judicial district, division, or combination of divisions. For the purposes of determining proportional representation in the master jury wheel, either the number of actual voters at the last general election in each county, parish, or similar political subdivision, or the number of registered voters if registration of voters is uniformly required throughout the district or division, may be used.

(4) provide for a master jury wheel (or a device similar in purpose and function) into which the names of those randomly selected shall be placed. The plan shall fix a minimum number of names to be placed initially in the master jury wheel, which shall be at least one-half of 1 per centum of the total number of persons on the lists used as a source of names for the district or division; but if this number of names is believed to be cumbersome and unnecessary, the plan may fix a smaller number of names to be placed in the master wheel, but in no event less than one thousand. The chief judge of the district court, or such other district court judge as the plan may provide, may order additional names to be placed in the master jury wheel from time to time as necessary. The plan shall provide for periodic emptying and refilling of the master jury wheel at specified times, the interval for which shall not exceed four years.

(5) specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title.

(6) specify those groups of persons or occupational classes whose members shall be barred from jury service on the ground that they are exempt. Such groups or classes shall be exempt only if the district court finds, and the plan states, that their exemption is in the public interest and would not be inconsistent with sections 1861 and 1862 of this title. The plan shall provide for exemption of the following persons: (i) members in active service in the Armed Forces of the United States; (ii) members of the fire or police departments of any State, district, territory, possession, or subdivision thereof; (iii) public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of official duties.

(7) fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.

(8) specify the procedures to be followed by the clerk or jury commission in assigning persons whose names have been drawn from the qualified jury wheel to grand and petit jury panels.

(c) The initial plan shall be devised by each district court and transmitted to the reviewing panel specified in subsection (a) of this section within one hundred and twenty days of the date of enactment of the Jury Selection and Service Act of 1968. The panel shall approve or direct the modification of each plan so submitted within sixty days thereafter. Each plan or modification made at the direction of the panel shall become effective after approval at such time thereafter as the panel directs, in no event to exceed ninety days from the date of approval. Modifications made at the instance of the district court under subsection (a) of this section shall be effective at such time thereafter as the panel directs, in no event to exceed ninety days from the date of modification.

(d) State, local, and Federal officials having custody, possession, or control of voter registration lists, lists of actual voters, or other appropriate records shall make such lists and records available to the jury commission or clerks for inspection, reproduction, and copying at all reasonable times as the commission or clerk may deem necessary and proper for the performance of duties under this title. The district courts shall have jurisdiction upon application by the Attorney General of the United States to compel compliance with this subsection by appropriate process.

28 United States Code 1864

(a) From time to time as directed by the district court, the clerk or a district judge shall publicly draw at random from the master jury wheel the names of as many persons as may be required for jury service. The clerk or jury commission shall prepare an alphabetical list of the names drawn, which list shall not be disclosed to any person except pursuant to the district court plan and to sections 1867 and 1868 of this title. The clerk or jury commission shall mail to every person whose name is drawn from the master wheel a juror qualification form accompanied by instructions to fill out and return the form, duly signed and sworn, to the clerk or jury commission by mail within ten

days. If the person is unable to fill out the form, another shall do it for him, and shall indicate that he has done so and the reason therefor. In any case in which it appears that there is an omission, ambiguity, or error in a form, the clerk or jury commission shall return the form with instructions to the person to make such additions or corrections as may be necessary and to return the form to the clerk or jury commission within ten days. Any person who fails to return a completed juror qualification form as instructed may be summoned by the clerk or jury commission forthwith to appear before the clerk or jury commission to fill out a juror qualification form. A person summoned to appear because of failure to return a juror qualification form as instructed who personally appears and executes a juror qualification form before the clerk or jury commission may, at the discretion of the district court, except where his prior failure to execute and mail such form was willful, be entitled to receive for such appearance the same fees and travel allowances paid to jurors under section 1871 of this title. At the time of his appearance for jury service, any person may be required to fill out another juror qualification form in the presence of the jury commission or the clerk or the court, at which time, in such cases as it appears warranted, the person may be questioned, but only with regard to his responses to questions contained on the form. Any information thus acquired by the clerk or jury commission may be noted on the juror qualification form and transmitted to the chief judge or such district court judge as the plan may provide.

(b) Any person summoned pursuant to subsection (a) of this section who fails to appear as directed shall be ordered by the district court forthwith to appear and show cause for his failure to comply with the summons. Any person who fails to appear pursuant to such order or who fails to show good cause for noncompliance with the summons may be fined not more than \$100 or imprisoned not more than three days, or both. Any person who willfully misrepresents a material fact on a juror qualification form for the purpose of

avoiding or securing service as a juror may be fined not more than \$100 or imprisoned not more than three days, or both.

28 United States Code 1865

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

28 United States Code 1866

(a) The jury commission, or in the absence thereof the clerk, shall maintain a qualified jury wheel and shall place in such wheel names of all persons drawn from the master jury wheel who are determined to be qualified as jurors and not exempt or excused pursuant to the district court plan. From time to time, the jury commission or the clerk shall publicly draw at random from the qualified jury wheel such number of names of persons as may be required for assignment to grand and petit jury panels. The jury commission or the clerk shall prepare a separate list of names of persons assigned to each grand and petit jury panel.

(b) When the court orders a grand or petit jury to be drawn, the clerk or jury commission or their duly designated deputies shall issue summonses for the required number of jurors.

Each person drawn for jury service may be served personally, or by registered, certified or first-class mail addressed to such person at his usual residence or business address.

If such service is made personally, the summons shall be delivered by the clerk or the jury commission or their duly designated deputies to the marshal who shall make such service.

If such service is made by mail, the summons may be served by the marshal or by the clerk, the jury commission or their duly designated deputies, who shall make affidavit of service and shall attach thereto any receipt from the addressee for a registered or certified summons.

(c) Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5) or (6) of section 1863(b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: *Provided*, That any person summoned for jury service may be (1) excused by the

court, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person shall be summoned again for jury service under subsections (b) and (c) of this section, or (2) excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or (3) excluded upon peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations. No person shall be excluded under clause (5) of this subsection unless the judge, in open court, determines that such is warranted and that exclusion of the person will not be inconsistent with sections 1861 and 1862 of this title. The number of persons excluded under clause (5) of this subsection shall not exceed one per centum of the number of persons who return executed jury qualification forms during the period, specified in the plan, between two consecutive fillings of the master jury wheel. The names of persons excluded under clause (5) of this subsection, together with detailed explanations for the exclusions, shall be forwarded immediately to the judicial council of the circuit, which shall have the power to make any appropriate order, prospective or retroactive to redress any misapplication of clause (5) of this subsection, but otherwise exclusions effectuated under such clause shall not be subject to challenge under the provisions of this title. Any person excluded from a particular jury under clause (2), (3), or (4) of this subsection shall be eligible to sit on another jury if the basis for his initial exclusion would not be relevant to his ability to serve on such other jury.

(d) Whenever a person is disqualified, excused, exempt, or excluded from jury service, the jury commission or clerk shall note in the space provided on his juror qualification

form or on the juror's card drawn from the qualified jury wheel the specific reason therefor.

(e) In any two-year period, no person shall be required to (1) serve or attend court for prospective service as a petit juror for a total of more than thirty days, except when necessary to complete service in a particular case, or (2) serve on more than one grand jury, or (3) serve as both a grand and petit juror.

(f) When there is an unanticipated shortage of available petit jurors drawn from the qualified jury wheel, the court may require the marshal to summon a sufficient number of petit jurors selected at random from the voter registration lists, lists of actual voters, or other lists specified in the plan, in a manner ordered by the court consistent with sections 1861 and 1862 of this title.

(g) Any person summoned for jury service who fails to appear as directed shall be ordered by the district court to appear forthwith and show cause for his failure to comply with the summons. Any person who fails to show good cause for noncompliance with a summons may be fined not more than \$100 or imprisoned not more than three days, or both.

28 United States Code 1867

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is

earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for

the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

(f) The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(b) (4) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than \$1,000 or imprisoned not more than one year, or both.

28 United States Code 1868

After the master jury wheel is emptied and refilled pursuant to section 1863(b) (4) of this title, and after all persons selected to serve as jurors before the master wheel was emptied have completed such service, all records and papers compiled and maintained by the jury commission or clerk before the master wheel was emptied shall be preserved in the custody of the clerk for four years or for such longer period as may be ordered by a court, and shall be available for public inspection for the purpose of determining the validity of the selection of any jury.

STATEMENT OF THE CASE

On August 28, 1981, Petitioners and five others¹ were indicted by a federal grand jury for conspiracy to possess with intent to distribute and to distribute marijuana in violation of 21 U.S.C. 846. Those indicted were arraigned on September 9, 1981. A Jury Trial upon the merits of these indictments was scheduled for January 5, 1982 before the Honorable Stewart A. Newblatt. Judge Newblatt set a motion cut-off date of November 30, 1981. However, on December 23, 1981, the Petit Jury Panel of this case was drawn. Petitioners filed their Motion for Evidentiary Hearing to Stay Proceedings, and for Selection of a Petit Jury in conformity with the Jury Selection and Service Act and Sixth Amendment. Within their motions, Petitioners alleged, among other things, that the Petit Jury panel had not been selected in conformity with the provisions of the Jury Selection and Service Act. (28 U.S.C. §§ 1861-1874). More particularly, it was alleged that pursuant to 28 U.S.C. 1863, the Eastern District of Michigan, Southern Division, had adopted a Jury Selection Plan which called for persons to be selected from voter registration lists for placement in a master jury wheel at periodic intervals not exceeding four (4) years. Under this local plan, persons selected would be mailed qualification forms and would be placed in a qualified jury wheel unless the forms disclosed a statutory basis for exemption from jury service, such as members of military, members of police or fire departments, and active public officials (28 U.S.C. 1863(b)(6)) and Section 7 of the local plan. Persons could also request excusal from jury service if over the age of seventy (70) or if had served upon

¹ The grand jury also indicted Ricky Meadows, Kenneth Spraker, Gregory Violette, Scott Violette, and Drew Wagner on these charges. Upon the conclusion of the jury trial, a guilty verdict was returned. Ricky Meadows was sentenced to five years imprisonment under Title 18 U.S.C. 4205(a) and a \$15,000 committed fine. Kenneth Spraker was sentenced to two and one half years imprisonment under Title 18 U.S.C. 4205(b)(2). Drew Wagner was sentenced to two years imprisonment under Title 18 U.S.C. 4205(a).

a Federal Grand or Petit Jury within the previous two (2) years.

Petitioners alleged that the Petit Jury Panel for this case was drawn on December 23, 1981 from a master wheel which was created from the 1976 voter registration lists, thus outside the permissible four year interval established by 28 U.S.C. 1963(b)(4) and Section 5.2 of the local plan. It was further alleged that Petitioners were restrained in their ability to establish the substantiality of this non-compliance because they had been denied access to records relating to the process by which persons were selected for inclusion in the master wheel and the qualified wheel in violation of 28 U.S.C. 1867(f). The relief sought by Petitioners was a stay of proceedings and an evidentiary hearing to ascertain the substantiality of the foregoing violations (28 U.S.C. 1867(d)).

A hearing upon the merits of this motion was held on January 5, 1982. Judge Newblatt denied the statutory issues raised by the motion on grounds that the Petitioners were untimely in bringing the motion and had failed to demonstrate a substantial violation of the Jury Selection Act. At this point, the Petitioners waived a trial by jury and this case proceeded to be tried by the court.

A bench trial was conducted on January 6, 1982 through January 15, 1982 before the Honorable Stewart Newblatt. The Petitioners were found guilty. Patrick Conway was sentenced to three (3) years imprisonment under 28 U.S.C. 4205(a). Robert Castro was sentenced to four (4) years imprisonment under 18 U.S.C. 4205(a) and a \$15,000 committed fine. Roy Castro was sentenced to one and one half (1½) years imprisonment under 18 U.S.C. 4205(b)(2) and a \$3,000 committed fine.

Petitioners filed a Claim of Appeal to the United States Court of Appeals for the Sixth Circuit, claiming that it was reversible error for the trial court to deny Petitioners' motion to stay proceedings and evidentiary hearing. Subsequent to the filing of briefs and oral argument, the Appel-

late Court rendered an opinion affirming the convictions of Petitioners. On June 30, 1983, the Appellate Court issued its order and mandate in this matter.

ARGUMENT

The Constitution guarantees that in criminal prosecutions the accused shall enjoy a trial by an impartial jury of the state and district wherein the crime shall have been committed.² The Jury Selection and Service Act³ goes a step further and requires that each district develop a plan for selection of petit jurors and that this plan include (A) specification of the list from which names would be drawn for inclusion in a master jury wheel, which must be periodically emptied and refilled at intervals not exceeding four (4) years; (B) provisions for the drawing of names from this master jury wheel and the mailing of juror qualification forms to all persons so drawn; and (C) specification of those groups or classes of persons who are exempt from jury service or who may be excused upon individual request.⁴

All persons whose names are drawn from the master jury wheel and who are neither exempt nor excused are placed in a qualified jury wheel—it is from this qualified jury wheel that a particular jury panel is drawn.⁵ The overarching purpose of the Jury Selection and Service Act of 1968⁶ was to eliminate the 'key man' system of jury selection, *Davis v. United States*, 411 U.S. 233; 93 S.Ct. 1577; 36 L.Ed2d 216 (1973), and to assure that the petit jury

² United States Constitution, Amendment 6.

³ 28 U.S.C. §§1861-1868.

⁴ 28 U.S.C. 1863 (a)(b)(4)(5)(6); 28 U.S.C. 1864; 28 U.S.C. 1865(b).

⁵ 28 U.S.C. 1866(a).

⁶ 28 U.S.C. 1861-1868.

would be "selected at random from a fair cross section of the community in the district where the court convenes."⁷

Consistent with these provisions, the *Jury Selection Plan for the Eastern District of Michigan* authorized utilization of voter registration lists for preparation of the master wheel, mandating, however, that the master wheel be emptied and refilled every four (4) years. That Plan also provided for excusal from jury service upon individual request only if a person were over the age of seventy (70) or had previously served upon a federal jury within the last two (2) years.⁸

In the current action, Petitioners allege that, despite existence of an Order commanding the drawing of a new master wheel from 1980 voter registration lists, the Clerk drew the jury panel for this case from a jury wheel created by reference to 1976 voter registration lists. In so doing, the Clerk violated 28 U.S.C. 1863(b)(4) and Section 5.2 of the Local Plan.

This violation would entitle Petitioners to a stay of proceedings and evidentiary hearing only upon proof that a 'substantial failure' to adhere to the requirements of the Act had resulted, which is to say, that non-compliance had generated jury lists which were not fairly representative of the community. See, *United States v. Tarnowski*, 429 F.Supp. 783, 791 (E.D. Mich., 1977) aff'd 583 F.2d 903 (6th Cir., 1978). Presumably, such a substantial failure could be demonstrated only by comparing the demography of the community existing in 1980 with the demography of the master wheel which had been created from 1976 voter registration lists. Indeed, the government itself articulated this burden by arguing that the trial that in order to show

⁷ In this case, the Trial Court sat in the Flint Administrative Unit of the Eastern District of Michigan, Southern Division, a unit consisting of the counties of Genesee, Lapeer, Livingston, and Shiawasee. See, Local Rule 7(a).

⁸ *Jury Selection Plan for the Eastern District of Michigan*, Sections 5.1, 5.2, 8.

that this ultimate Panel is improperly constituted, assuming it is statistical, defendants would still have to go all the way back to the list, to the original 6,000 names chosen for this particular panel.

Recognizing this burden, Petitioners vigorously sought access to the master jury wheel records, doing so before December 23, 1982 or the time when the actual panel for this case was drawn. Yet those records were never produced, a circumstance which virtually rendered it impossible to demonstrate a substantial failure.

As indicated in *Test v. United States*, 420 U.S. 28; 95 S.Ct. 749; 42 L.Ed.2d 786, 789 (1975), defendants had:

[e]ssentially an *unqualified* right to inspect jury lists. [The Act] grants access in order to aid parties in the 'preparation' of motions challenging jury-selection procedures. Indeed, without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge. (emphasis added)

The importance of *Test* is clear—the failure to permit inspection of jury lists is in itself a 'substantial failure' to comply with the Jury Selection and Service Act entitling a defendant to a stay of proceedings and an evidentiary hearing. In the face of *Test*, the trial court thus erred in holding that defendants had failed to establish substantial failure; and since the Petitioners' Motion for Evidentiary Hearing was filed well before trial, the trial court also erred in holding that the motion was untimely. See, 28 U.S.C. 1867(a).

Since it was only after denial of that motion that Petitioners waived the jury, the only remedy is to reverse the resulting convictions and remand this action for a new trial and for the opportunity to intelligently determine "whether the jury selection process warrants challenge and as to whether [defendants] prefer trial by a representative jury or before the court." *United States v. Davis*, 592 F.2d 887, 890 (5th Cir., 1979).

CONCLUSION

WHEREFORE, Petitioners PATRICK CONWAY, ROBERT CASTRO, and ROY CASTRO pray that this Petition be granted, that their convictions be reversed, and that this matter be remanded to the United States District Court for the Eastern District of Michigan, Southern Division, to allow them a new trial on the charges.

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Dated: August 19, 1983

APPENDIX

APPENDIX A — Order of the United States Court of Appeals for the Sixth Circuit which contains its Opinion entered June 30, 1983.

1a
Order

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD MEADOWS, DREW WAGNER,
KENNETH SPRAKER, ROBERT JINX
CASTRO, ROY CASTRO, PATRICK
CONWAY,

Defendants-Appellants.

Nos. 82-1331
82-1332
82-1346
82-1347
82-1348
82-1370

ORDER

Before: LIVELY and ENGEL, Circuit Judges; and PECK,
Senior Circuit Judge

The six defendants named in this appeal challenge their convictions for conspiracy to distribute marijuana in violation of 21 U.S.C. § 846. All six collectively argue that the district court erred in denying their jury selection challenges as untimely. Additionally, defendants Robert Castro and Richard Meadows individually contend that insufficient evidence was adduced at trial to establish their knowing participation in the conspiracy.

The defendants were indicted on August 28, 1981 and tried on January 6, 1982. Although District Judge Newblatt set a motion cut-off date of November 30, 1981, the record shows no attempt to gain access to jury selection materials until November 27, 1981. A motion to dismiss the indictments for substantial failure to comply with provisions of the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861 *et seq.*, was not made until December 14, 1981. District Judge Feikens conducted a hearing on this matter, but denied the motion as untimely under the Act due to the lack of diligence by defense counsel in not raising the issue earlier.

Upon a review of the record as a whole, the court is of the opinion that there was overwhelming evidence to support the conclusion that a conspiracy to distribute marijuana existed during the periods of Meadow's and Robert Castro's involvement. "Once the existence of a conspiracy is clearly established, slight evidence may be sufficient to connect a defendant with it." *Poliafico v. United States*, 237 F.2d 97, 104 (6th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957). The court believes that there was ample evidence from which the trial judge could find beyond a reasonable doubt that Meadows and Robert Castro each had knowledge of that conspiracy and adopted it as his own by actions calculated to further its objectives. *Id.*

There is no merit in the claim of alleged noncompliance with the Jury Selection and Service Act since the challenge was not timely made. The exclusive means of presenting such challenges in this situation requires an appropriate motion "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered by the exercise of diligence, the grounds therefor, whichever is earlier." 28 U.S.C. § 1867(a). In dismissing the motion, Judge Feikens found that "defendants' counsel did not show diligence in raising this matter for the first time [until after over three months of trial preparation]." Recognizing that "[t]he [timeliness] requirements of the statute are strictly enforced," *United States v. Young*, 570 F.2d 152, 153 (6th Cir. 1978), we find no abuse of discretion in this ruling. *Cf. United States v. Foxworth*, 599 F.2d 1, 3 n.3 (1st Cir. 1979) (section 1867 motion found untimely when filed nine days after indictment and eight days after appointment of counsel who knew of grounds for challenge at time of appointment). Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

(s) John P. Heleman
Clerk